SUPREME COURT, U.S.
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No. 93-609

In the Supreme Court of the United States

OCTOBER TERM, 1993

FIRST REPUBLICBANK CORPORATION, ET AL.,
PETITIONERS

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934 (Exchange Act), which provides for the reinstatement of certain private actions under Section 10(b) of the Exchange Act that were dismissed as untimely under *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), violates the separation of powers doctrine or the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Anixter v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993)	6
Axel Johnson Inc. v. *Arthur Andersen & Co.*, No. 92-7624 (2d Cir. Sept. 27, 1993)	5, 6
Berning v. *A.G. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993)	6
Cooke v. *Manufactured Homes, Inc.*, 998 F. 2d 1256 (4th Cir. 1993)	6
Cooperativa de Ahorro y Credito Aguada v. *Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993), petition for cert. pending, No. 93-564	6
Gray v. *First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993)	6
Henderson v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993)	6
James B. Beam Distilling Co. v. *Georgia*, 111 S. Ct. 2439 (1991)	3
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 111 S. Ct. 2773 (1991)	2, 3
Plaut v. *Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993)	5
Sioux, Ltd., Securities Litigation, In re v. *Coopers & Lybrand*, 914 F.2d 61 (5th Cir. 1990)	2

Constitution, statutes and regulation:

	Page
U.S. Const. Amend. V (Due Process Clause)	5
Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387	3
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:	
§ 9(e), 15 U.S.C. 78i(e)	2
§ 10(b), 15 U.S.C. 78j(b)	2, 3, 6
§ 27A, 15 U.S.C. 78aa-1 (Supp. III 1991)	3, 4, 5, 6
§ 27A(a), 15 U.S.C. 78aa-1(a) (Supp. III 1991)	3, 4, 6
§ 27A(b), 15 U.S.C. 78aa-1(b) (Supp. III 1991)	3, 4, 5, 6
28 U.S.C. 2403(a)	4
17 C.F.R. 240.10b-5	2, 3

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A33, is reported at 997 F.2d 39. The opinion of the district court, Pet. App. B1-B15, is reported at 806 F. Supp. 108.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1993. The petition for a writ of certiorari was filed on October 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1991, respondent Pacific Mutual Life Insurance Company (Pacific Mutual) filed a securities fraud action against petitioners in the

United States District Court for the Northern District of Texas. The complaint stated claims arising under Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, as well as pendent state common law claims. Pacific Mutual's claims arose from securities transactions that occurred in July and September 1987, approximately three and one-half years before it filed suit. Pet. App. A3.

At the time Pacific Mutual brought suit, the Exchange Act did not contain a statute of limitations expressly applicable to claims under Section 10(b) or Rule 10b-5. In the absence of an express federal statute of limitations, the Fifth Circuit, like a number of other courts of appeals, had held that private Rule 10b-5 actions were subject to limitations periods borrowed from state law. See, *e.g.*, *In re Sioux, Ltd., Securities Litigation* v. *Coopers & Lybrand*, 914 F.2d 61, 64 (5th Cir. 1990). The applicable Texas statute of limitations subjected Pacific Mutual's claims to a four-year limitations period. *Ibid.* Accordingly, petitioners did not contest the timeliness of this action. Pet. App. A3.

On June 20, 1991, while the action was pending before the district court, this Court rendered its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991). *Lampf* holds that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e). Under that provision, a suit may not be brought more than one year after the fraud is discovered or more than three years after it occurs. 111 S. Ct. at 2782. On the same

day that *Lampf* was decided, this Court also decided *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in which it disallowed the use in civil litigation of a judicial rule of "selective prospectivity"—the practice of applying a new judicial interpretation of the law in the case in which it is announced but not applying it to other pending suits.

Shortly thereafter, petitioners moved for dismissal of this suit on the ground that it was untimely under the federal limitations period adopted in *Lampf* and made retroactive by *Beam*.[1] In August 1991, the district court dismissed the federal claims with prejudice under *Lampf*. Because the federal claims were plainly untimely under *Lampf*, Pacific Mutual did not appeal. Pet. App. A4.

2. In December 1991, four months after the dismissal of this action, Congress enacted legislation adding Section 27A, 15 U.S.C. 78aa-1 (Supp. III 1991), to the Exchange Act. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Section 27A applies to private Rule 10b-5 actions that were commenced before June 20, 1991, the date that *Lampf* was decided. Subsection (a) of Section 27A provides that the limitations periods for such pre-*Lampf* suits shall be the limitations periods that had prevailed in the particular jurisdiction before *Lampf*. Subsection (b) of Section 27A provides for the reinstatement of pre-

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[1] This Court applied its holding adopting a federal limitations period for Section 10(b) actions to the parties in *Lampf* itself. See 111 S. Ct. at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting). As a result, under *Beam*, the new limitations period adopted in *Lampf* became applicable to all other pending private Rule 10b-5 actions.

Lampf suits that were dismissed as time-barred under *Lampf* but were timely under the jurisdiction's pre-*Lampf* rules. Subsection (b) required motions for reinstatement to be filed within 60 days of the enactment of Section 27A. 15 U.S.C. 78aa-1(a) and (b) (Supp. III 1991).

In January 1992, within the 60-day period prescribed by subsection (b), Pacific Mutual moved to reinstate its federal securities claims. Pet. App. A5. The district court denied the reinstatement motion in July 1992 on the ground that subsection (b) is unconstitutional. *Id.* at B1-B15. The district court held that subsection (b) violates the separation of powers doctrine by reopening final judgments of federal courts. *Id.* at B5-B15.

3. Pacific Mutual appealed. The court of appeals consolidated that appeal with the appeal from another district court decision that had held Section 27A(b) unconstitutional,[2] and the United States intervened in both appeals, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Section 27A.[3] Pet. App. A8.

The court of appeals reversed, rejecting all constitutional challenges to Section 27A(b). Pet. App. A13-A33. The court held that neither the separation of

[2] *TGX Corp.* v. *Simmons*, No. 92-3375 (5th Cir.), petitions for cert. pending *sub nom. BDO Seidman* v. *Simmons*, No. 93-313 (filed Aug. 26, 1993), and *Continental Insurance Co.* v. *Simmons*, No. 93-611 (filed Oct. 18, 1993).

[3] When the constitutionality of an Act of Congress "affecting the public interest" is called into question in a federal suit to which the United States is not a party, 28 U.S.C. 2403(a) directs the court to "permit the United States to intervene for presentation of evidence * * * and for argument on the question of constitutionality."

powers doctrine nor the Due Process Clause of the Fifth Amendment prohibits Congress from creating a statutory mechanism for reinstating previously timely suits that were dismissed as untimely under *Lampf*. Pet. App. A14-A25, A29-A33.

ARGUMENT

Petitioners challenge the holding of the court of appeals that Section 27A(b) of the Exchange Act is constitutional. Pet. 9-20. In our view, the court of appeals correctly rejected petitioners' constitutional claims and upheld Section 27A(b). The Fifth Circuit's decision, however, conflicts with *Plaut* v. *Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993), rehearing denied (Oct. 14, 1993), in which the Sixth Circuit held that Section 27A(b) violates the separation of powers doctrine.[4] In so holding, *Plaut* squarely rejected the constitutional views adopted by the Fifth Circuit here.

Because the Fifth and Sixth Circuits have rendered conflicting decisions on the issue in this case, because the Sixth Circuit's decision in *Plaut* invalidates an Act of Congress, and because the constitutional issue arises in a number of additional cases of which we are aware,[5] the Court should resolve the

[4] We note that the constitutionality of subsection (b) of Section 27A is currently before the Tenth Circuit in *Johnston* v. *CIGNA Corp.*, No. 92-1186 (argued Sept. 27, 1993). The Second Circuit rejected a constitutional challenge to subsection (b) in *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, No. 92-7624 (Sept. 27, 1993), but it rested its decision on narrow grounds (the absence of a final judgment in the case) and did not decide the constitutionality of the provision as a general matter.

[5] Rule 10b-5 claims were reinstated under subsection (b) in *Adler* v. *Berg Harmon Associates*, No. 89 Civ 8114 (S.D.N.Y.);

constitutionality of subsection (b) of Section 27A.[6] The constitutional issues are squarely presented by the present petition, and we are unaware of any procedural obstacle in this case that would prevent the Court from resolving those issues here.[7]

Casserly v. *Shearson Lehman Hutton*, No. 4-90-125 (D. Minn); cf. *Johnston* v. *CIGNA Corp.*, *supra* (motion denied).

[6] In contrast, there is no circuit conflict over the constitutionality of subsection *(a)* of Section 27A. Seven courts of appeals have held subsection (a) to be constitutional; none has held otherwise; and this Court has twice denied certiorari petitions seeking review of that issue. See *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993); *Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993); *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir.), petition for cert. pending, No. 93-564 (filed Oct. 12, 1993); *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, No. 92-7624 (2d Cir. Sept. 27, 1993); *Cooke* v. *Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Berning* v. *A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 279 (7th Cir. 1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993).

[7] In contrast, the petitions in *BDO Seidman* v. *Simmons*, No. 93-313, and *Continental Insurance Co.* v. *Simmons*, No. 93-611, which seek review of the same court of appeals decision, but arise out of a different district court action, see note 2, *supra*, are not suitable vehicles for review of the constitutional issues. As we explain in our response to those petitions (a copy of which has been served on petitioners here), the Section 10(b) litigation involved in No. 93-313 and No. 93-611 was dismissed under *Lampf* without prejudice. The reinstatement of those actions under Section 27A(b) therefore raises, at most, only a narrow constitutional issue. Because the action involved in this petition was dismissed under *Lampf* with prejudice, the present petition is a better vehicle than the petitions in No. 93-313 and No. 93-611 for reviewing the constitutionality of subsection (b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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